

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

NOV 14 1991

BURLINGTON COMMUNITY SCHOOL
DISTRICT,

Public Employer,

and

AFSCME IOWA COUNCIL 61,
Petitioner.

PUBLIC EMPLOYMENT
RELATIONS BOARD

CASE NO. 4519

PROPOSED DECISION AND ORDER

Diane Tvrdik, Administrative Law Judge. The proceeding arises from the unit determination portion of the combined petition for unit determination and certification filed with the Public Employment Relations Board [PERB or Board] by AFSCME, Iowa Council 61 [AFSCME or Union] on July 11, 1991. The petition was filed pursuant to Chapter 4 of the PERB rules¹ and Sections 20.13 and 20.14 of the Public Employment Relations Act [Act].²

AFSCME has petitioned PERB to represent the following described bargaining unit:

INCLUDED: Food service managers, cooks, assistant cooks, bakers, general food service workers, cashiers.

EXCLUDED: Those excluded by the Act.

AFSCME seeks to include within the bargaining unit the position of food service manager. The Burlington Community School District [District] maintains that this position is a supervisory position and is therefore excluded under the Act.

¹Iowa Admin. Code, 621-r. 4 (1989)

²All references to the Iowa Code will be the Iowa Code (1991).

A hearing was held at the PERB conference room, on October 24, 1991. The only issue presented for determination is whether the position of food service manager is excluded under the Act as a supervisory position. The District was represented by Terry Loeschen, and AFSCME was represented by Dan Varner. The parties had full opportunity at hearing to present witness testimony and other evidence. No briefs were filed. Based upon the entire record in this case, I issue the following proposed Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

The District is a public employer within the meaning of §20.3(1), and AFSCME is an employee organization within the meaning of §20.3(4).

Three employees of the District testified at hearing: (1) Joe Hintze [Hintze] is the director of Auxiliary Enterprises and directs, among other school departments, the food service operation; (2) Jean Miller [Miller] is the director of food services, and has held this position with the District for approximately 20 years; (3) Debra Ertzinger [Ertzinger] has been a food service manager [FS manager] with the District for approximately ten years.

The position of FS manager is currently held by three individuals who are assigned to the Burlington High School and each of the Burlington Middle Schools. These three managers supervise a total of approximately 65 employees.

Miller testified that currently there are seven classifications within the food service operation, however she did not indicate what those seven classifications were. She did discuss the position of FS manager, and further mentioned that there is a designated leadworker position. The 1991-92 school year is the first year that such a leadworker position has been in existence, but no further testimony was elicited as to the job duties or job requirements of the leadworker position.

According to Miller, each FS manager has the authority to: recommend promotions, transfer an employee from one position to another, sign and approve time sheets, approve sick leave and personal leave, approve funeral and jury leave, change work schedules, recommend moving substitutes into a full-time position, obtain subs when needed, and to evaluate employee performance. Miller specifically noted, however, that this authority exists only with her concurrence. She indicated that all leaves were submitted to her by the FS manager, for her signature. Miller expects the FS managers to deny leave when they have information which indicates that the employee who has requested a leave of absence is not entitled to such a leave. She gave no examples where any of the three FS managers had ever, in fact, denied such a leave (e.g. sick day, funeral leave). Ertzinger testified that all such leaves are recorded on a standardized "PM form" and are then submitted to Miller. The forms remain unsigned until Miller herself signs them. Miller testified that the FS managers had the authority to recommend moving a substitute into a full-time position, however

there is no record that such recommendation has been made to or acted upon by Miller.

While the record shows that the FS manager does not directly request maintenance or repair from the director of custodial service, the FS manager does note any repair requests made by the food service workers, then forwards that information to Miller who takes the appropriate action. Ertzinger and the other FS managers also attempt to find substitutes when an employee is absent due to sickness or vacation or funeral, and then let Miller's office know that a substitute has been called in. It is not unusual for Miller's office to assist in calling in substitutes. In the event that there is work which needs to be done and a substitute either has not been called in yet or has not arrived, it is not uncommon for Ertzinger to shuffle the existing workers around or work the position herself until the sub arrives. Ertzinger also works "in the kitchen with the other women", and assists in the training of new employees or assists an employee who falls behind in their work duties. Additionally the FS manager oversees the food supplies and grocery ordering, and assures that proper food is prepared in appropriate quantities.

In May of 1990, Miller evaluated Ertzinger and advised her that she was deficient in three areas, and further advised her that significant improvement would be necessary in order for Ertzinger to remain in her position with the District in the 90-91 school year.³ Both Miller and Hintze testified that in order to assist

³District Exhibit #4.

Ertzinger in sharpening her skills as a FS manager, the noted areas of deficiency were relayed to Ertzinger, and Miller maintained follow-up evaluations. Hintze testified that the District suggested that Ertzinger enroll in job-related courses at the area community college. The District paid Ertzinger's tuition and fees, and further paid her salary while she completed the courses of stress management, and work environment & dietary guidelines. The District asserts that it paid for the courses because it considers Ertzinger a supervisor. The combined tuition cost of the two courses was \$55. Stress management was a six-clock-hour course for which Ertzinger received a continuing education program award and the 1990 Dietary Guidelines was a four-clock-hour course for which she also received a continuing education program award presented by Southeastern Community College.

According to Miller, the FS managers not only evaluate employee performance, but make recommendations for retention or dismissal of those employees who have been evaluated. Ertzinger testified that the FS managers make no independent judgments on transfers or terminations, even with an employee who has definitely not been doing the required job, or has not met the work goals. She further testified that the FS managers may not independently discipline or discharge an employee who fails to follow the hygiene guidelines (e.g. failing to wear hair net or wearing fingernail polish to work) but Miller has asked the FS manager to make a notation on the employee evaluation report. Both Miller and Ertzinger testified as to the significance of a new-employee

evaluation completed for an employee [Ms. H.] who was eventually allowed by Miller to resign. Ms. H. began work on September 4, 1990 and was initially evaluated by Ertzinger on November 1, 1990.⁴ On that evaluation, Ms. H. was given evaluation marks in the average, below average, and unsatisfactory columns, in addition to a written narrative by Ertzinger. Ertzinger recommended that Ms. H. have a second evaluation prior to the end of a thirty-day probationary period. The second evaluation was completed by Ertzinger on March 1, 1991. No explanation was presented by either Ertzinger or Miller as to why Ms. H. was not evaluated prior to December 2, 1990 (i.e. 30 days from evaluation #1). On that second evaluation, Ertzinger again made notations in the average, below average and unsatisfactory columns and wrote another lengthy report which indicated her dissatisfaction with Ms. H. It was undisputed that Ertzinger, on a number of occasions, verbally brought to Miller's attention the poor quality of work done by Ms. H., and her poor work attitude. It was also undisputed that Ertzinger questioned Miller as to what was to be done with Ms. H., "what was I [Ertzinger] to do with this employee?". After reviewing Ertzinger's recommendation, Miller did not dismiss Ms. H. but gave her an option of voluntarily quitting. At the end of the 90-91 school year, Miller allowed Ms. H. to resign for the upcoming 91-92 school year, however, Miller allowed Ms. H. to work, as scheduled, for the remainder of the 90-91 school year.⁵ Miller also allowed

⁴District Exhibit #3.

⁵Id.

Ms. H. to be placed on the substitute list for 91-92 school year.

Hintze holds administrative meetings two times a month, which Miller attends. Those attending are the administrative team (i.e. supervisors, principals, Hintze). The FS managers are not invited to attend these meetings. Miller also holds meetings with the three FS managers, approximately two times a month. These meetings do not include other food service workers. The topics of Miller's meetings are; menu planning, and "planning meetings" (subject matter varies).

Miller is a salaried employee and has a benefit package which is different from that of the benefit package of the FS manager and the other food service workers but is similar to that of Hintze. Ertzinger's salary is hourly and she has a benefit package similar to that of all other food service workers. For approximately ten years, Ertzinger has been on the employee committee which has presented proposals, on wages and other terms and conditions of employment, to management in what is know as a "meet and confer" setting. Ertzinger has been the employee's committee chairperson for several years and has met with Miller and Hintze, who sat on the "administrative side" of the table. Undisputed testimony indicated that the proposals were presented, by Ertzinger and fellow employees, to the representatives of the District, which included both Hintze and Miller.

If there is a complaint among the food service workers, the employees may go to the FS manager, who then forwards the complaint on to Miller's office. If the employee receives no satisfactory

response from Miller, then Ertzinger would take the complaint to Hintze, on behalf of the employee. Hintze and Miller may adjust employee grievances or complaints, however the FS manager has no authority to adjust such grievances.

CONCLUSIONS OF LAW

The District argues that the position of FS manager should be excluded from the proposed bargaining unit on the basis that it is a supervisory position. The Union, on the other hand, seeks to include within the bargaining unit the position of FS manager, and argues that the position is, at most, that of a "leadman". The Iowa Supreme Court and PERB caselaw have given considerable guidance as to the construction of the term "supervisory employee".⁶ In the City of Davenport, the court indicated that the issue of supervisory status is a fact question involving "a case-by-case approach".⁷ The court also held that the supervisory functions enumerated in §20.4(2) of the Act were written disjunctively;

possession of any one of them is sufficient to make an employee a supervisor. The power must exist in reality, not only on paper. However, it is the existence of the power and not its exercise which is determinative. What the statute requires is evidence of actual supervisory authority "visibly translated into tangible examples..."

In addition, "the statute expressly insists that a supervisor (1) have authority (2) to use independent judgment (3) in performing such supervisory functions (4)

⁶See, City of Davenport v. PERB, 264 N.W.2d 307 (Iowa 1978); Des Moines County, 88 PERB 3493 and 3502; City of Pella, 88 PERB 3620; City of Perry, 90 H.O. 3888 and Cardinal Community School District, 91 H.O. 4327.

⁷City of Davenport at 313.

in the interest of management. These latter requirements are conjunctive." . . . Authority to perform one of the enumerated functions is not supervisory if the responsibility is routine or clerical.

Repetitive or rote tasks are not considered supervisory. Nor are functions requiring little more than use of common sense.

Moreover, the directing and assigning of work by a skilled employee to less skilled employee does not involve the use of independent judgment when it is incidental to the application of the skilled employee's technical or professional know-how. In such a situation the skilled employee does not exercise independent judgment as a representative of management within the meaning of the statutory requirement. [all citations omitted]⁸

The Act specifically provides that "supervisors" are excluded from coverage,⁹ however, the Act is interpreted to provide broad coverage, and therefore, the exclusions contained in §20.4 are to be construed narrowly.¹⁰ Both the Iowa Supreme Court and PERB have recognized the term "leadman" or "straw boss".¹¹ In City of Ames, the hearing officer stated that the term "leadman":

⁸Id at 314.

⁹Iowa Code 20.4(2) in relevant part: Supervisory employee means any individual having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment. . .

¹⁰See e.g., Iowa Assn. of School Boards v. PERB, 400 N.W.2d 571, 576 (Iowa 1987); Dubuque Community School District, 86 PERB 2988; City of Perry, 90 H.O. 3888.

¹¹City of Davenport at 322 and City of Ames, 75 H.O. 15.

By definition suggests some responsibility beyond that of a rank-and-file employee; it is customarily applied to an individual who directs the work of a small group of employees, while at the same time performing the same work as those employees. . . . The critical element is whether their direction of the work is routine in nature and does not call for frequent exercise of independent judgment or managerial discretion.¹²

In City of Davenport v. PERB, the court set out that:

Supervisory determinations depend upon how completely the job position's duties identify the employee with management; for supervisory status to exist this identification must be substantial; acting merely as a conduit for orders emanating from supervisors is routine; temporary or occasional service as a supervisory is not qualifying, a test isn't what an employee may have as responsibilities and authority under occasional or remote circumstances but what the employee's functions and responsibilities are in the normal course of affairs...¹³

The record is void of any evidence that the FS managers possess specific authority to hire, transfer, suspend, layoff, recall, promote, reward or discipline other employees, nor do I perceive that the FS manager may effectively recommend such action to the food service director. When reviewing the record regarding the authority to discharge, it is clear that on the one occasion which Ertzinger did recommend the dismissal of an employee (Ms. H.) to Miller, Miller disregarded that recommendation and, in fact, allowed the ineffective worker to continue her work throughout the remainder of the school year. Miller further allowed Ms. H. to submit a resignation rather than terminating her, and also allowed Ms. H. to remain as a substitute food service worker for the

¹²City of Ames, 75 H.O. 15 at p. 6; City of Perry, 90 H.O. 3888.

¹³City of Davenport v. PERB, at 314-15.

following school year. I do not find that Ertzinger's recommendation to terminate Ms. H., even when presented in both written and verbal format,¹⁴ was an effective recommendation, nor was it taken as such by Miller. Effective recommendation has been defined as that which under normal policy and circumstances is made at the chief executive level or below, and is adopted by higher authority without independent review or de novo consideration as a matter of course.¹⁵ The required concurrence by Miller of all decisions of the FS managers negates their ability to effectively recommend. The record does not indicate any FS manager has ever made a recommendation that substitutes be promoted to full-time food service workers. No evidence was presented that the FS managers had ever exercised authority in transferring workers between jobs or work sites nor does the evidence indicate that recommendations regarding termination made by Ertzinger or any other FS manager has been followed as a matter of course by Miller.

With regards to the FS manager's authority to grant leaves of absence, I find they exercise this authority in only a routine manner. All examples in the record demonstrate that this function is performed in a perfunctory manner with no independent authority above that of a leadworker. I note that while the FS managers have the authority to call in substitutes, evidence suggests that they

¹⁴District Exhibit #3 indicates that Ertzinger failed to circle the "recommends dismissal" but credible testimony indicated that Miller was aware that Ertzinger recommended the termination of Ms. H.

¹⁵See also, City of Dubuque, 89 PERB 3317; City of Mason City, 86 PERB 3040.

do so only to expedite the process of having a full complement of workers. Miller's office and sometimes Miller herself also takes part in calling substitutes. I do not find that calling a sub when a "regular" employee is absent is anything more than a routine function, one which calls for common sense but not the use of independent supervisory authority.

I conclude that the FS manager position is not entitled to removal from the bargaining unit on the basis of being a supervisory position as urged by the District, and that the position shall remain included within the proposed bargaining unit.

Based upon the foregoing Findings of Fact and Conclusions of Law, I conclude that the following constitutes an appropriate bargaining unit within the meaning of §20.13 of the Act:

INCLUDED: Food service managers, all leadworkers, cooks, assistant cooks, all satellite food service workers, cashiers/tickets, dish machine operators, general preparation kitchen employees and all other general food service employees.

EXCLUDED: Superintendent, principals, director of auxiliary services, director of food services, and all others excluded by Section 4 of the Act.

Based on the foregoing Conclusions of Law, I issue the following proposed:

ORDER

IT IS HEREBY ORDERED that an election be conducted under the supervision and direction of the Public Employment Relations Board at a time and place to be determined by the Board. Eligible to vote are all employees in the above described bargaining unit who were employed during the payroll period immediately preceding the

date below and who are also employed in the bargaining unit on the date of the election.

IT IS FURTHER ORDERED that the Burlington Community School District submit to the Board within seven days an alphabetical list with the names, addresses and job classifications of all eligible voters in the unit described above.

DATED at Des Moines, Iowa this 14th day of November, 1991.

PUBLIC EMPLOYMENT RELATIONS BOARD

A handwritten signature in dark ink, appearing to read "Diane Tvrdik", written over a horizontal line.

Diane Tvrdik,
Administrative Law Judge